No. 92-1516

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IN THE

Supreme Court of the United States

October Term, 1992

MAGNESIUM ELEKTRON, INC.,
Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. and FRIENDS OF THE EARTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred by improperly applying the requirements of standing embodied in Article III of the United States Constitution and by failing to follow standing requirements articulated by this Court in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), because they did not require Respondents in a Clean Water Act citizens' suit to (a) show a concrete and particularized actual or threatened injury as a result of Petitioner's conduct; (b) that the alleged injury was fairly traceable to the challenged conduct; and (c) was likely to be redressed by a favorable decision.

RULE 29.1—STATEMENT

Petitioner, Magnesium Elektron, Inc. is a wholly-owned subsidiary of British Alcan Overseas Investments, Limited, an English Company.

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OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey granting a permanent injunction against Petitioner, Magnesium Elektron, Inc., and finding that Respondents have Article III standing was issued on January 23, 1992, and became effective by Order dated February 28, 1992. The Opinion is reported at 34 E.R.C. 2077 and 22 E.L.R. 20362 (D.N.J. January 23, 1992) and is reprinted in the Appendix at A3-A29; the Order is set forth in the Appendix at A30-A31.

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court was issued on December 15, 1992, and is reprinted in the Appendix at A1-A2. Petitioner's Request for Rehearing was denied by Order dated January 8, 1993, and is set forth in the Appendix at A32-A33.

JURISDICTION

Subject matter jurisdiction in the United States District Court for the District of New Jersey was predicated on 33 U.S.C. §1365. An Opinion granting a permanent injunction against Petitioner, Magnesium Elektron, Inc., and finding that Respondents have Article III standing was issued on January 23, 1992 and became effective by Order dated February 28, 1992.

Petitioner timely appealed to the United States Court of Appeals for the Third Circuit in accordance with 28 U.S.C. §1292(a)(1). The Court of Appeals affirmed the judgment of the lower court without a written opinion by Judgment Order dated December 15, 1992. A timely-filed Petition for Rehearing was denied by the Court of Appeals on January 8, 1993.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1), and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Article III, Section 2, Clause 1 provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different states;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 505(a) of the Federal Water Pollution Control Act, 33 U.S.C. §1365 (hereinafter referred to as the "Clean Water Act"), provides in pertinent part:

> Citizen Suits
>
> Except as provided in subsection (b) of this section, and section 309(g)(6) any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

Section 505 of the Clean Water Act is set forth in the Appendix at A34.

STATEMENT OF THE CASE

A. The Facts

Petitioner Magnesium Elektron, Inc. (hereinafter "MEI"), a New Jersey corporation, is a NPDES/NJPDES permit holder which owns and operates a plant in Flemington, New Jersey which produces zirconium compounds used in various applications including antiperspirants. This process produces an effluent which is neutralized and suspended solids are removed, leaving a pure concentrated salt water similar to natural sea water. The effluent is non-toxic. The discharge of the effluent is regulated by NPDES/NJPDES Permit No. NJ0027537 (the "permit") which establishes certain discharge limitations and reporting requirements to the New Jersey Department of Environmental Protection ("NJDEP").

The salt water effluent is first discharged from the plant into receiving ponds as established by the permit, and then into the Wickecheoke Creek. The Creek eventually joins the Delaware and Raritan Canal which runs parallel to the Delaware River. The required monitoring is conducted before the effluent is discharged into the Creek, at various other areas along the path of the Creek, and at one point in the Canal a few hundred yards downstream from the intersection of the Creek, the Canal and the spillway to the River. No other monitoring is required under the permit. The monitoring data is compiled by MEI pursuant to the permit and is reported to the NJDEP on a monthly basis by submission of discharge monitoring reports ("DMRs").

The permit, which expressly *authorizes* MEI to discharge its effluent into the Wickecheoke Creek, imposes specific discharge limitations upon MEI for

various parameters, including total organic carbon ("TOC"), total dissolved solids ("TDS"), total suspended solids ("TSS"), sodium, temperature and oil.

During the time period February, 1984 through July, 1989, various technical violations of the permit were monitored and reported to the NJDEP by MEI. In 1989, the NJDEP initiated an administrative enforcement action against MEI motivated by public criticism of the NJDEP by Respondents[1] for the technical permit violations.[2] On July 26, 1989, Respondents commenced this private citizens suit against MEI under §505 of the Clean Water Act, 33 U.S.C. §1365 seeking civil penalties and a permanent injunction prohibiting MEI from further discharges into the Creek based on the same substantive violations at issue in the administrative action. In this case, MEI did not dispute that "technical" violations of the permit occurred and, accordingly, consented to two Stipulations approved by the trial court.

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[1] The NJDEP had not initiated any enforcement action against MEI prior to 1989, but apparently felt compelled to do so after public criticism by Respondents. It must also be noted that the Administrative Law Judge found all of the violations to be "unintentional."

[2] On July 25, 1989, a civil penalty was assessed against MEI. The penalty assessment was appealed to the Superior Court of New Jersey, Appellate Division, on the ground that the application of the regulations was arbitrary and capricious under the circumstances because they are inconsistent with the objectives of the statute. *See Public Service Electric & Gas Co. v. NJDEP,* 101 N.J. 95, 501 A.2d 125 (1985).

Additionally, years of Creek flow data were compiled by MEI during the excursionary periods to develop a model to more accurately establish permit standards at the discharge pipe. This would eliminate the technical excusions. A new permit embodying these changes has been pending for approximately five years.

On March 6, 1991, Respondents filed a motion for partial summary judgment as to liability and for permanent injunctive relief. MEI opposed the motion on numerous grounds including (1) Respondents' failure to establish irrevocable harm to the environment or themselves, (2) the excursions were unreliable due to the measuring techniques employed by the testing laboratories, and (3) many of the excursions were merely "technical" violations relating to naturally-occurring environmental activities and phenomena. Respondents also filed a motion for declaratory judgment on or about May 17, 1991 requesting an Order that they have standing to maintain this action against MEI. MEI opposed Respondents' motion based, *inter alia*, on the fact that Respondents failed to demonstrate that they suffered any actual or threatened injury fairly traceable to MEI's effluent discharges and, therefore, any alleged injury will not be redressed by a decision favorable to Respondents. MEI also urged the court to withhold decision on standing until an evidentiary hearing was conducted.

On January 23, 1992, the trial court issued its Opinion[3] holding that Respondents have standing to maintain this action although they did not demonstrate any injury in fact traceable to MEI. The court also issued a permanent injunction against MEI prohibiting further discharges into the Wickecheoke Creek. Alcan timely filed a Notice of Appeal from the Order on March 25, 1992, pursuant to 28 U.S.C. §1292(a)(1).[4]

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[3] The district court specifically designated the Opinion as "NOT FOR PUBLICATION". A5.

[4] MEI's Appeal to the Third Circuit on an interlocutory basis resulted from an order of the lower court granting a contested motion for summary judgment on the issues of standing and injunctive relief. MEI immediately appealed because of the extreme costs (approximately $1,000,000 per year) of hauling effluent necessitated by the injunction. Moreover, further events in this case in the lower courts will have no impact on the issue of standing.

The Court of Appeals affirmed the lower court's decision without a written opinion on December 15, 1992. MEI's Petition for Rehearing was denied on January 8, 1993. This Petition is filed pursuant to 28 U.S.C. §1254(1).

B. The Issues

This case involves the fundamental issue of what the requisite elements of Article III standing are in order to maintain a citizens' suit under §505 of the Clean Water Act, 33 U.S.C. §1365. In other words, is injury in fact, causation and redressibility required.

This Honorable Court most recently addressed this issue in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (hereinafter "*Lujan II*"), by stating that, to have standing, private parties in environmental matters *must* satisfy three fundamental elements:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an *injury in fact* an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent', not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be '*fairly traceable* to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely', as opposed to merely 'speculative,' that the *injury will be 'redressed* by the favorable decision.'

Lujan II, 112 S. Ct. at 2136 (citations omitted) (emphasis added). The Third Circuit, in affirming the decision of the United States District Court, effectively rejected this Court's construction of the Article III requirements, and failed to comply with the mandates of the Constitution.

Notwithstanding this Court's clear and unequivocal statement as to what is required to meet Article III standing in environmental matters, the Third Circuit determined that a lower, less stringent standard is adequate to confer standing, and has, in its own words at oral argument, reduced standing to a "complete fiction". This results from the fact that Respondents, by their counsel's own admission at oral argument, cannot show any real injury, much less injury caused by any of the permit excursions. Respondents' contention is that, contrary to this Court's explicit statements in *Lujan II* and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), they are not required to demonstrate injury in fact or causation to satisfy Article III. Rather, Respondents assert, and the Third Circuit agreed, that all that must be shown is that the excursions affect or harm the *kinds of injury* being asserted by the Respondents. Additionally, the Third Circuit refused to require Respondents to demonstrate that MEI's effluent was technically capable of causing the type of harm alleged.

This Court has held that requirements for establishing standing are not general. It has required courts to examine each type of permit violation and each alleged injury to determine whether there is traceability and therefore standing as to each violation. Neither the trial court nor the appellate court examined the exact nature of the alleged injury to Respondents as a result of the excursions, nor did they make a specific determination as to how the alleged injury was fairly traceable to MEI. In other words, the lower courts did not undertake their respective obligations to make the required inquiry into the issues of injury and traceability.

The third element of standing ignored by the Third Circuit is redressibility. Redressibility in this case is impossible. The ecosystem in which Respondents have identified their interest is subjected to more of the allegedly offending effluent as a result of the lower court's injunction, since MEI is now legally discharging all of its effluent into the Delaware River upstream of the area which is the primary location of Respondent's alleged harm. Moreover, the injunction can have no bearing on the thermal impact of MEI's effluent on the Creek since the thermal load, if any, was naturally created by the sun.

The decision of the Third Circuit affirming the lower court's ruling that Respondents have standing in this case as a matter of law clearly conflicts with the United States Constitution and the applicable decisions of this Court and should, therefore, be reversed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT PETITIONER'S WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FAILED TO COMPLY WITH THE STANDING REQUIREMENTS OF INJURY, CAUSATION AND REDRESSIBILITY EMBODIED IN ARTICLE III OF THE CONSTITUTION AND MANDATED BY THIS COURT.

A. The Permit Excursions In This Case Were The Result Of Naturally-Occurring Phenomena And Were Regulatory Anomalies That Were Technically Incapable Of Causing The Harm Alleged.

At the outset, an explanation of the nature of the permit excursions is necessary since they are essential in evaluating the injury, traceability and redressibility requirements for standing as promulgated by this Court. The standing requirements stem from the constitutional requisite of a "case" or "controversy" which limits federal judicial power to cases in which "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). Absent such a showing, standing does not exist.

In this case, Respondents failed to demonstrate the injury, causation and redressibility necessary to confer standing. In order to establish standing, the permit violations at issue must be technically capable of causing the harm alleged. Otherwise, there can be no injury fairly traceable to defendant's conduct capable of being redressed by the court. The nature and composition of the effluent coupled with the technical permit violations in this case demonstrate that they are simply incapable

of causing the injury and harm alleged in the Respondents' affidavits which are reproduced in the Appendix at A35-A47.

The environment is a very complex system. Therefore, regulatory schemes with the most beneficial objectives may be frustrated by the unpredictability of nature. This problem becomes more acute when, like here, the permit regulations are not aimed at some rather unusual chemical discharge such as methleyene chloride, but instead address more innocuous and common materials.

The majority of the excurions at issue in this case do not relate to materials generated in the MEI process. Rather, they relate to natural environmental conditions and phenomena, or measurement anomalies. Specifically, they relate to the impact of the sun naturally warming both the Creek and the effluent, algae growing in the effluent storage ponds as a result of migrating geese dropping fecal matter into the effluent, and momentary overages in salt—the same salt in the ocean and in food—due to the inability to predict mother nature. There were also two questionable oil excursions that were most likely testing errors since they were split samples in which one part showed an excursion while the other part did not. This conclusion is further supported by the fact that no other oil excursions ever occurred.

MEI's zirconium-manufacturing process does not produce heat that could account for the temperature excursions. The excursions resulted from the heating of the effluent by the sun. The permit regulations had been drafted in a manner that unrealistically assumed changes in temperatures based on times of the year. In fact, the differences in minimum temperatures in the regulations could change as much as ten degrees from one day to the next. Unfortunately, mother nature is not

so predictable or accommodating and on a number of occasions it was much warmer than the regulations contemplated. The result was that the effluent storage pond temperature rose; however, the Creek temperature was equally affected by the unusually warm conditions. Thus, the pond water entered the Creek at essentially the same temperature as that of the Creek. Although this resulted in a violation as a technical matter, it had *no impact* on the thermal condition of the Creek and was incapable of causing injury. Ironically, if MEI had artificially cooled the effluent to comply with the regulations, the environmental impact would have been negative due to the thermal change.

The TOC violations were a function of the natural consequences of migratory geese inhabiting the ponds, and measurement anomalies. As mentioned, the MEI process does not involve organic carbon and none is discharged as waste effluent. Accordingly, the MEI process cannot account for the excursions. Any high levels of TOC resulted not from the MEI process, but from geese using the ponds as a natural habitat. The geese fecal matter is organic carbon and acts as a fertilizer. When introduced into the ponds, it precipitated the growth of algae which is not only organic carbon, but a plant that produces rather than eliminates dissolved oxygen.[5] The resulting conditions that existed in the ponds were in essence no different than the rich and verdant conditions that exist naturally in wildlife preserves.[6] The conditions on the MEI site and in its

[5] The TOC parameter was initially included in the permit by the State of New Jersey as a surrogate measure of the availability of dissolved oxygen that could not be directly measured in salt solutions like those of MEI.

[6] Indeed, the conditions existing in MEI's storage ponds are consistent with a national policy to encourage the development of habitats for migratory water fowl promulgated by the Department of Agriculture. *See e.g.* Water Bank Act, Public Law, 91-559 and 96-182.

effluent have achieved the very conditions for which the state had imposed the regulatory parameters in the first instance—a condition which promoted the development of "flora" and "fauna". However, the conditions also resulted in technical violations of the Clean Water Act. The question presented by this case is whether those "technical" violations which could cause no injury to Respondents gives rise to standing.

The salt excursions were the direct result of a timing problem. There was never any question that the total amount of salt that MEI discharged never exceeded what it could have discharged without violation. The problem involved predicting with precision the enormously complex ecosystem in order to put the right amount of effluent into the Creek so when it combined with salt from a thirty square mile drainage area there were no violations. Unlike the usual regulatory standard that simply places limits on the amount of material that can be discharged, the MEI parameter was unusual, since it did not regulate the amount of effluent that MEI could discharge into the Creek directly. Instead, it limited salt concentrations at one point in the Creek four miles downstream of the discharge point, and another point in the Delaware-Raritan Canal eight miles downstream.

From a theoretical point of view this was the perfect regulatory framework: MEI's discharges were scaled to account for other salt inputs such as road salt runoff. The practical application, however, proved far more difficult since excursions could be caused by something other than MEI's discharges. In fact, excursions were recorded by the automatic monitoring equipment at times when MEI was not discharging at all! What makes this even more compelling is the fact that the Respondents stipulated to the accuracy of the technical consequences of these excursions reported in a

September 15, 1981 Limnological Study of the Wickecheoke Creek Ecosystem, and the conclusion was that there was no harm to the ecosystem:

> [A]ny impact which can be perceived does not 'significantly effect propagation of indigenous biota'; does not interfere with biological communities or populations of important species to a degree which is damaging to the ecosystem'; and does not 'interfere with the maintenance of the water quality in a safe and satisfactory condition for wildlife, fish and other aquatic life.' The 'qualification' is that at times it is possible to discern a moderate change in the patterns of dominance of (not the quality of, or the quantity of) microscopic organisms (Aufwuchs) which is related to the presence of the MEI effluent .... [T]his phenomenon is difficult, if not impossible, to relate legitimately any characteristic of the stream community to the presence of the effluent. At no time during this study has there been evidence of any impact whatsoever on the biota at Station 12, targeted as the point where the presence of the effluent is to be monitored to assure compliance with several agreements between the company and agency personnel.

The reporting violations were administrative anomalies rather than substantive violations. They fall into two categories. One type of violation related to the failure to report to the NJDEP because no sample was taken. The sample was not and could not be taken because the discharge stream from which the sample was required to be taken was shut off since the Creek had unexpectedly stopped flowing. A sample could only be obtained and tested if MEI illegally discharged.

Other reporting violations do not result from a failure to report, but instead result from the fact that the effluent discharge operators could not accurately estimate the exact time an excursion might occur. The

operators therefore had to make the best estimate as to whether it was for example, 11:59 p.m. or 12:01 a.m. Subsequent calculations might prove that the operator's estimate was inaccurate and the actual excursion occurred at 12:01 a.m. (technically the next day), and this would be recorded as a reporting violation since it occurred on a day other than that reported. Both of the reporting violations are technical anomalies and have nothing to do with the failure to supply substantive information to the NJDEP.

In short, the record demonstrates that although "technical" violations of the Clean Water Act were reported, the nature of the effluent and the excursions leads to the inescapable conclusion that the excursions neither harmed nor impaired any of the affiants' activities. Notwithstanding these facts and without a thorough analysis of the injury and harm alleged by the affiants or an examination of whether such harm or injury is fairly traceable to the effluent, the lower courts found standing contrary to the requirements of the Constitution and this Court.

II. THERE IS A CLEAR AND IRRECONCILABLE CONFLICT BETWEEN THIS COURT'S STANDARD FOR STANDING AND THAT APPLIED BY THE THIRD CIRCUIT COURT OF APPEALS.

This case was evaluated under a lower threshold for standing than this Court's decision in *Lujan II*, and thus there is a fundamental conflict between this Court's holding as to what is required for Article III standing and the position of the Third Circuit Court of Appeals. In *Lujan II* this Court affirmed a long line of cases which established the following constitutional elements of standing that must be met in an environmental case:

> 1. the plaintiff must have suffered injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;
>
> 2. there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third-party not before the court;
>
> 3. it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

112 S. Ct. at 2136. The party invoking jurisdiction has the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

Respondents in this case can show none of the requirements for standing as defined by this Court. Moreover, Respondents were not required to meet the well-defined standing requirements because the standards applied by the district court and affirmed by the Third Circuit *reduce* these requirements.

The district court, relying on the Third Circuit's decision in *PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) held that a plaintiff bringing a citizen suit under the Clean Water Act need only establish that a defendant has:

> 1) discharged some pollutant in concentrations greater than allowed by its permit;
>
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and
>
> 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

A13, citing *Powell Duffryn*, 913 F.2d at 72.

This attenuated standard significantly broadens standing and effectively eliminates the injury in fact and redressibility requirements. The Third Circuit's interpretation and application of the constitutional standing requirements contradicts the standards repeatedly articulated by this Court and most recently reaffirmed in *Lujan II*.

The lower courts rejected the notion that there needed to be injury in fact or that it be fairly traceable to MEI's actions. Further, the alleged injuries are not redressed as a result of the decision, but are exacerbated because 100% of MEI's effluent is discharged into the Delaware River where the affiants recreate. The three part test applied by the lower court and affirmed by the Third Circuit did not require a "concrete or particularized" injury, nor does it as a practical matter demonstrate the injury to be fairly traceable to actions of MEI.

The same analysis applies to each of the affiants' allegations of harm. A35-A47. Each of the affiants state that they enjoy certain recreational activities along the

Delaware and Raritan Canal and the Delaware River. None of the affiants state that they use the Wickecheoke Creek for their recreational activities. Rather, all of their activities are along the Canal and the River. These activities include walking, hiking, studying nature, picnicking, boating, skiing and fishing. A35-A47. The affiants state that their enjoyment of these activities is affected to the extent that they know the waterways in or near which they conduct their activities contain pollution. A35-A47.

However, an ideological interest in a matter is not enough for standing. *Sierra Club v. Morton*, 405 U.S. at 739 ("a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient. . ."). Although this Court in *Morton* recognized that harm to aesthetic and recreational interests is sufficient to confer standing, the affiants do not establish *how* any of their activities are affected by MEI's effluent or the violations. Each of the affiants allege only generalized and generic environmental concerns and fears regarding the River and Canal. Therefore, Respondents have failed to allege any concrete or particularized injury as required by this Court. It is insufficient for a plaintiff to allege harm because of a refusal to recreate in waters that are perceived to be polluted. A plaintiff must establish *how* they are injured in order to satisfy the injury requirement. In this case, Respondents' affiants did not and could not allege a particularized injury since MEI's effluent is incapable of harming Respondents or the environment.[7]

[7] In *Sierra Club v. Morton*, the complaint alleged that plaintiffs' enjoyment of Sequoia National Park would be impaired because the proposed ski resort would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park. 405 U.S.

(Footnote continued on following page.)

For example, the affidavit of Chaim Gold submitted by Respondents alleges that he cannot swim in "polluted" waters because it aggravates his psoriasis. A40. These allegations are not tantamount to the injury in fact requirement of Article III. First, complaining about "polluted" water is complaining about a potential universe of pollutants most of which are wholly unrelated to anything contained in MEI's effluent. Second, salt water is a recognized treatment for psoriasis and therefore MEI's effluent is incapable of causing the injury Mr. Gold alleges. Mr. Gold cannot be threatened by an injury that is technically incapable of occurring. Therefore, Mr. Gold has not satisfied the injury in fact requirement. This Court has recognized that "hypothetical" or "conjectural" injuries are insufficient to confer standing. *Lujan II*, 112 S. Ct. at 2136. Mr. Gold's psoriasis cannot be aggravated by anything that MEI discharges. His skin is only exposed to the MEI materials when water skiing in the Delaware River some fifty miles from the MEI discharge into the Creek. There is no doubt that the concentration of the MEI material is insignificant at that point and could have no negative effect on Mr. Gold. Moreover, all of the salt excursions occurred in the Canal and not the River.

The connection of thermal excursions to any injury alleged by Mr. Gold or the other affiants is even more tenuous since the effluent entered the Creek at the same temperature of the Creek. Therefore, the excursions could have no impact on Mr. Gold's skin condition, not to mention the fact that his water-related activities were conducted fifty miles away.

(Footnote continued from preceding page.)

at 734. This Court held that this type of harm may amount to an "injury in fact," but denied standing because plaintiffs failed to show that they would personally be affected. This differs from this case, where Respondents have failed to allege any actual harm they have or could suffer as a result of MEI's discharges.

A similar analysis can be done for TOC. The organic carbon in the effluent is similar to the same organic material present in the waterways in the most pristine state of nature. The MEI TOC would be quite insignificant and, in fact, would be undetectable in the vast volumes of the Delaware downstream.

Nonetheless, the lower courts refused to accept the injury in fact requirement. Moreover, since the matter was presented to the lower court in the context of a motion for summary judgment, it had to construe the evidence in favor of MEI and assume that there was no injury in fact. The lower court refused to acknowledge that the injury in fact standard was relevant; it did not require a statement of particularized injury, but simply held that standing was appropriate for Mr. Gold because he states that he cannot swim in polluted waters due to his psoriasis, although he could swim in the waters if they were clean. A40.

The lower court also rejected the notion of traceability: *i.e.*, was the Respondents' injury in fact caused by the conduct of MEI. The Third Circuit's view is that whether or not the plaintiff's injury was caused by the defendant is irrelevant as long as the pollutant "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Powell Duffryn*, 913 F.2d at 72. This standard was once again reaffirmed by the Third Circuit *sub silentio* in this case. This position conflicts directly with the requirement of this Court that the harm must be a direct result of the defendant's action, not those of a third party. *Lujan II*, 112 S. Ct. at 2136.

The dialogue in the Third Circuit between Respondents' counsel and the panel during oral arguments made it clear that Respondents would not have standing on the facts alleged if they were required

to show that MEI's material, in fact, resulted in their alleged injury. Judge Alito pointed out to Respondents' counsel that his staff had undertaken an effort to quantify the extent of the impact of the MEI salt discharge, and concluded that the impact on the stream was less than discharging some very pricey bottled mineral waters such as "Polinaris".

Judge Alito further questioned Respondents' counsel as to how it could demonstrate any impact of the effluent many miles downstream in the Delaware River. Arguing that it was the purpose of the Clean Water Act to force everyone to "zero discharge" because "pollution is harmful", counsel conceded that Respondents would be unable to demonstrate standing if the more stringent standards had to be met. This Court makes it very clear that if there is no harm in fact, there can be no traceability, and if the defendant who caused the harm is not before the court, then there can never be redressibility. The Respondents are not before the court righting a wrong to them personally, but forcing the court to usurp the role of the executive by undertaking what is in effect an enforcement action.

This is exemplified by Ms. Howat, who claims a concern about her ability to recreate and study nature without defining *how* her interests are affected. A46. The MEI TOC was the natural consequence of a habitat of migrating geese and Ms. Howat would have been exposed to vastly higher amounts of the same materials in Montezuma National Wildlife Preserve or Yellowstone National Park. It is hard to understand how her ability to study nature is impaired.

The result is that if the affiants are really being harmed by some pollution in the waterways, that harm is continuing and this lawsuit is totally irrelevant to that harm. As is obviously the case, the Third Circuit doctrine has permitted persons who are suffering no harm at all to become the vehicles for environmental organizations to implement their political agenda and fund their captive law firms. The Respondents here are attempting to "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'," contrary to the mandates of this Court. *Valley Forge, supra*, 454 U.S. at 473, quoting in part *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

III. THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE THIRD CIRCUIT IS FULLY AWARE THAT ITS POSITION IS INCONSISTENT WITH THE CONSTITUTION AND THE POSITION OF THIS COURT AND IT HAS PROMULGATED A CONSTITUTIONAL STANDARD THAT SETS IT APART FROM OTHER CIRCUIT COURTS IN THE COUNTRY.

The lower court's decision relies on the reasoning of the Third Circuit in *Powell Duffryn, supra.* Yet, even in *Powell Duffryn,* the Third Circuit knew that its holding was inconsistent with the constitutional doctrines for standing that had been promulgated by this Court. In a concurring opinion, Judge Aldisert leaves little doubt that the Third Circuit's position in *Powell Duffryn* was a departure from this Court's historical position when he stated:

> I join in the opinion of the court and write separately only to express a nagging doubt about standing.
>
> Throughout my extensive preparation of this case including close attention at argument and discussion with my colleagues at conference, I was persuaded that the member/plaintiffs had failed to show an actual injury that was traceable to the permit violations. I am now willing to join my colleagues' view. But I feel somewhat like Lord Byron's fair maiden in Don Juan, c 1, dedication cxvii,
>
> > A little more she strove, and much repented, And whispering "I will ne'er consent"—consented.

913 F.2d at 83.

In this case, Respondents used the same boilerplate form affidavits that were used in *Powell Duffryn.* However, unlike *Powell Duffryn,* standing was held to

exist on a motion for summary judgment and, therefore, MEI was unable to directly demonstrate insufficiencies of the affidavits. Nonetheless, the Third Circuit accepted those averments even though Judge Aldisert recognized that they were insufficient to meet the requirements of *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (hereinafter "*Lujan I*"):

> The [United States Supreme] Court insisted that affidavits of the member/plaintiffs show that the "injury [the affiant] complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provisions whose violation forms the legal bases for his complaint." The Court directed us not to "[assume] that general averments embrace the 'specific facts' needed to sustain" standing. If such are the Court's requirements to prove standing under a statute, it follows, a fortiori, that the Court requires some stringency in meeting Article III standing, the issue before us here. Nevertheless, I still am inclined to find standing. Perhaps my wish to find standing is father to the thought, but in view of *Lujan* [*v. National Wildlife Federation*], I hope it is not, as John Greenleaf Whitter put it, a "wish that failed of act."

913 F.2d at 84 (citations omitted.)

Since Judge Aldisert's comments, this Court has revisited the issue of Article III standing as it relates to environmental cases in *Lujan II*, which explicitly addressed the issue of standing in the context of Article III. *Lujan II* did not reduce the stringency of the standing requirements. On the contrary, it reaffirmed the standards that Judge Aldisert conceded were not met in *Powell Duffryn*, and were clearly not met in this case. The Third Circuit affirmed without a written opinion

because, in MEI's view, there is no way that the Third Circuit can reconcile its decision with the standards that this Court has stated must apply.

The Third Circuit has apparently reached the conclusion that the essential separation of powers which is the hallmark of our form of government and the basis of the standing requirement is not going to apply within the realm of its jurisdiction, and that standing is a mere abstract formality that is satisfied by only a "gossamer case." As this Court clearly stated in *Lujan II*, the Congress may not by statute transfer the authority of the executive to the courts. 112 S. Ct. at 2145.

Further, Congress does not have the authority to override the Constitutional standing requirements. The Third Circuit's position is that citizen-suit plaintiffs have automatic standing wherever there is a permit violation. Indeed, Judge Aldisert noted in his concurring opinion in *Powell Duffryn*, 913 F.2d at 84, his concern "that this enthusiasm has led environmental organizations and citizen plaintiffs to mistakenly believe that they have standing to sue any time a discharge permit is violated." The Third Circuit in *Powell Duffryn* acknowledged that the Clean Water Act confers standing *to the limits of the Constitution*, 913 F.2d at 70 n.3, and yet ignored what this Court has interpreted those limits to be.

In this case, as in *Powell Duffryn*, there is little doubt that the Respondents' organizations have decided that the government's implementation of the Clean Water Act is not consistent with its views as to what serves the public interest. As indicated earlier, Respondents' counsel had expressed their view that no discharge should be permitted and that it is their view that the private citizen suit is the mechanism by which it will seek to obtain that objective by seeking penalties for

activities that cannot be shown to cause harm. This policy of creating the lawsuit and then looking for an injury to justify it is precisely what Judge Aldisert identified in *Powell Duffryn* and clearly what is taking place in this case:

> I see PIRG and FOE in the position of the old-time vaudeville performer's ad in *Variety*: "Have tux, will travel." PIRG and FOE advertised: "Have case, need live-bodied members/plaintiffs." The questions for this court are: Were the recruited live bodies sufficiently injured to sustain this action, or more specifically, was theirs an "injury [that] fairly can be traced to the challenged action," or otherwise stated, did they "show injury in fact resulting from the action which they seek to have the court adjudicate?"
>
> Maybe the wrong plaintiffs were recruited. Or, perhaps the plaintiffs were not sufficiently coached before their depositions. Whatever the case, constitutional standing is a serious question here.

913 F.2d at 84-85 (citation omitted.)

The quesiton of standing is far weaker in this case than *Powell Duffryn*. For example, in *Powell Duffryn*, Judge Aldisert acknowledges that there is injury in fact. Citing Cheryl Cummings and the dismal condition of the Kill Van Kull, Judge Adlisert points out that Ms. Cummings said her enjoyment of the Kill Van Kull Park has been diminished because of "a film" on the water which is "sometimes like a rainbow or sometimes like greenish-yellow." 913 F.2d at 87. In her deposition, Judge Aldisert points out that Ms. Cummings concedes that had the allegations of the lawsuit been explained to her she would not have been able to join it. *Id.*

In this case, the Respondents' affiants never acknowledged the existence of any sign of pollution. In fact, the stipulated facts from the Limnological Study indicated that the impact of the MEI effluent on the Creek was essentially undetectable miles above the closest location that any of the affiants had ever come. Moreover, by resolving the matter on summary judgment based on affiants never disclosed as potential witnesses before the close of discovery, the lower court effectively foreclosed any inspection of the underlying claims. There can be little doubt after the most cursory review of the facts that the Third Circuit has decided that it is unhappy with the actions of the enforcement agencies and has decided that, notwithstanding the proscription of this Court, that it will usurp the role of enforcement.

Although the Third Circuit has attempted to modify its language so the conflict with this Court's decisions and Article III is not so apparent, the conclusion that there is a conflict is inescapable. After reviewing the testimony in *Powell Duffryn* and concluding that there was no link between the alleged injuries and any act of the defendant, Judge Aldisert concluded as follows:

> I believe that the foregoing (absence of traceability) is a fair summary of the evidence of the injuries and the 'injury in fact resulting from the action they seek to have the court adjudicate.' Is it enough? I'm not sure. *Were this not an environment[al] case, it certainly would not be.* I come down on the side of standing with stated qualms that are soothed somewhat by the notion that the evolving precepts of standing are perhaps expanded a bit when at stake are the great public policy considerations of insults to our environment.

913 F.2d at 89 (citation omitted) (emphasis added).

In *Lujan II*, this Court failed to placate Judge Aldisert's qualms and restated the proposition that Article III minimums do not vary with the apparent urgency of the political issue of the moment. Emboldened by what may appear to be insulation from review by this Court, the Third Circuit has approved standing in this case on even more extreme facts than those that troubled Judge Aldisert. District courts in the Third Circuit have been so encouraged by the apparent disregard for Article III requirements that they feel sufficiently secure that they explicitly reject notions that this Court has long held as irreducible minimums. *See e.g., SPRIG v. Hercules, Inc.*, 23 E.R.C. 2081, 2086 (D.N.J. 1986) ("affiants' inability to link the pollution of the river to defendant's activities is irrelevant"); *SPRIG v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200 (D.N.J. 1985) (holding that Clean Water Act plaintiffs "having standing to sue because the general public interest will benefit". A "personalized showing of redressibility [is] neither appropriate nor necessary.")

In this case, Respondents have not and, indeed, cannot establish a direct and palpable concrete injury traceable to MEI's conduct nor can their alleged injury be redressed by a favorable ruling. Unless this Honorable Court grants this Petition, lower courts will continue to ignore the constitutional requirements and governing rules of law promulgated by this Court. Accordingly, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, Petitioner Magnesium Elektron, Inc. requests that this Honorable Court issue a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Dated December 15, 1992)

No. 92-5161

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.; FRIENDS OF THE EARTH; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Plaintiff,

v.

MAGNESIUM ELEKTRON, INC.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. CIVIL ACTION NO. 89-03193
(HONORABLE JOHN C. LIFLAND)

Argued December 8, 1992

Before: SCIRICA, ALITO and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. J. SCIRICA
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, *Clerk*

DEC 15 1992

DECISION OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

(Decided January 23, 1992)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

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34 ERC 2077

[2078] **Clean Water Act**

National pollutant discharge elimination system—Permits (►115.2505)

Enforcement—Citizen suits—Standing (►115.8020.03)

[1] Citizen groups have standing to bring enforcement action against chemical company that violated Clean Water Act discharge permit requirements, because: (1) affidavits of groups' members showed that excessive pollutant discharges threatened their recreational, health, and environmental interests and that reporting violations hindered efforts to obtain information needed to support research and advocacy work, (2) members' claims will be redressed if court

grants relief requested in suit, (3) interests that groups seek to protect are consistent with organizational purposes of groups, and (4) suit does not require participation of individual group members.

National pollutant discharge elimination system—Permits (► 115.2505)

National pollutant discharge elimination system—Discharge requirements (► 115.2515)

National pollutant discharge elimination system—Monitoring and reporting requirements (► 115.2520)

[2] Chemical company is liable for exceeding limitations for total organic carbon discharges and violating monitoring and reporting requirements in Clean Water Act permit, because: (1) monitoring reports showed that company violated TOC limitations; (2) company failed to show that reported results were caused by actual errors in sample tests; (3) even though company claimed method approved by Environmental Protection Agency for measuring TOC concentrations overstated actual amount of organic carbon in samples, claim is improper where it is effectively challenge to permit terms that may not be raised in context of enforcement action; and (4) company does not dispute that it violated monitoring and reporting requirements.

National pollutant discharge elimination system—Permits (► 115.2505)

Judicial procedure and review—Remedies (► 115.9030)

[3] Federal district court will issue injunction to prevent chemical company from continuing to violate Clean Water Act discharge permit requirements, even

though company already ceased discharging to receiving waters, because: (1) citizen groups showed that company violated permit terms; (2) court finds irreparable harm to public health, fish, and aquatic life will result if excessive discharges are allowed to continue; and (3) history of company's actions and threat that company will resume discharges because of high cost of sending effluent to treatment facility suggest that injunction is necessary.

On motion by citizen groups for declaration that they have standing to bring Clean Water Act suit against chemical company and for partial summary judgment on issue of company's liability for alleged violations of total organic carbon limits in discharge permit; motion granted.

Susan J. McGolrick and Monica Wagner, Wash., D.C., for plaintiffs.

Lawrence Salibra, Cleveland, Ohio, for defendant.

Before John C. Lifland, district judge.

*Full Text of Opinion**

Plaintiffs, Public Interest Research Group of New Jersey ("PIRG") and Friends of the Earth ("FOE") (also referred to collectively as "plaintiffs") move for a declaratory judgment that they have standing to litigate this action, and for partial summary judgment on the issue of liability against defendant Magnesium Elektron, Inc. ("MEI").

* The court designated this opinion as "Not for Publication."

BACKGROUND

Plaintiffs are non-profit corporations which seek injunctive relief and civil penalties for MEI's violations of its National Pollution Discharge Elimination System/[2079] New Jersey Pollution Discharge Elimination System ("NPDES/NJPDES") permit. This permit was issued pursuant to §402(a) of the Federal Water Pollution Control Act, 33 U.S.C. §1342(a), (the "Clean Water Act" 33 U.S.C. §1251 *et seq.*) (hereinafter "the Act"). MEI is a New Jersey corporation engaged in the business of zirconium chemical production.

The Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through strict limits on discharges of pollutants. 33 U.S.C. §1251(a)(1). The Act prohibits all discharges into navigable waters without a permit, which limits the type and concentrations of pollutants that may be discharged. Compliance with the permit is deemed compliance with the Act. 33 U.S.C. §§1342(k) and 1344(p). As a condition of the permit, the permit holder must install and maintain equipment to test its discharges and report the results to the Environmental Protection Agency (or the state agency) on Discharge Monitoring Reports ("DMRs"). 40 C.F.R. §§122.41(j) and 122.48 (1989).

33 U.S.C. §1365 entitled "Citizen Suits" provides:

> (a) Except as provided in subsection (b) of this section . . . any citizen may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . .

In 1976 the EPA issued to MEI permit number 0027537, which authorized it to discharge limited quantities of pollutants into the Wickecheoke Creek ("the creek"). The permit set forth discharge limitations and monitoring and reporting requirements for various pollutants. The EPA thereafter delegated responsibility for administering the NPDES program to the New Jersey Department of Environmental Protection ("NJDEP"). NJDEP issued to MEI NJPDES permit number 0027537 in 1984, which authorized MEI to discharge limited amounts of pollutants into the creek. *See* Plaintiffs' Exhibit 1. This permit expired on November 30, 1989, and no new permit has been issued as of this date. By law, the expired permit remains in effect until a new permit is issued. N.J.S.A. §52:14B-11, N.J.A.C. §7:14A-2.3.

MEI discharges wastewater into the creek, which flows into the Delaware and Raritan Canal approximately 8.5 miles downstream from MEI's discharge point. The Creek and the Canal are hereinafter referred to collectively as the "waterways". The Delaware and Raritan Canal is part of the Delaware and Raritan Canal State Park. The New Jersey Water Supply Authority draws water from the Canal to supply potable water to several municipalities in New Jersey. Plaintiffs state that the Canal is a source of drinking water for approximately 1,000,000 people in central New Jersey. MEI does not dispute that the Creek and the Canal are used for recreational purposes such as fishing, boating and swimming. Moreover, the land adjacent to the waterways is used for hiking, exhibits and concerts.

MEI has stipulated to liability for violations from 1984 to 1989, including the following: 41 violations of the discharge limitations for total dissolved solids, sodium,

temperature and oil; 76 violations of the monitoring requirements; 4 violations of the reporting requirements; and 2 bypass violations. *See* Plaintiffs' Exhibit 3.[1] This motion involves 27 alleged violations of discharge limitations for Total Organic Carbon ("TOC") and MEI's failure to report and monitor as required by its permit, in violation of §§301, 308 and 402 of the Act. The permit limits TOC discharges to 20mg/liter to be monitored one day per month and reported to NJDEP no later than the 25th day of the month. *See* Plaintiffs' Exhibit 1; and Plaintiffs' Exhibit 5 which lists the TOC violations.

DISCUSSION

I. Standing

PIRG and FOE move for a declaratory judgment that they have standing to litigate this action. An organization has standing where:

> 1) the organization's members would have standing to sue on their own,
>
> [2080] 2) the interests the organization seeks to protect are germane to its purpose, and
>
> 3) neither the claim asserted nor the relief requested requires individual participation by its members.

Public Interest Research Group of New Jersey v. Powell Duffryn, 913 F.2d 64, 70 [31 ERC 1905] (3d Cir. 1990), *citing Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Automobile Workers v. Brock*, 477 U.S. 274 (1986). In *Powell* PIRG and FOE brought suit pursuant to 33 U.S.C. §1365(a) against a permit holder for violations of its operating permit under the

[1] MEI also stipulated to 50 additional violations occurring prior to 1984 which plaintiffs do not pursue because of the statute of limitations.

Clean Water Act. That defendant opposed the plaintiffs' motion for summary judgment on liability, in part, on the basis that PIRG lacked standing. The defendant argued that PIRG's members lacked standing on their own under the first prong of the *Hunt* test. The Third Circuit noted that the Act confers standing to the limits of the Constitution. *Id.* at 70 n.3. The court stated that individual standing requires that a plaintiff show:

> 1) an actual or threatened injury suffered as a result of the conduct of the defendant,
>
> 2) which is "fairly traceable to the challenged action", and
>
> 3) "is likely to be redressed by a favorable decision".

Powell, 913 F.2d at 70, *quoting Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

A. Individual Standing Of Plaintiffs' Members

MEI argues, as did the defendants in *Powell*, that plaintiffs have failed to establish that their members suffered an actual injury that can be traced directly to its discharge of effluents. MEI argues that its violations are "technical" in nature and too minor to contribute to plaintiffs' injuries, and that any pollution of the waterways is caused by other sources, such as the sun and duck droppings. MEI also asserts that plaintiffs have not established that their injuries would be redressed by a favorable decision.

MEI does not dispute any facts concerning plaintiffs' standing. Rather, MEI contests the legal standards by which standing is determined.

1. Actual Injury

In support of their position that they have standing, PIRG and FOE submit affidavits of their members. *See* Plaintiffs' Exhibits 1-5. Plaintiffs' members state that they live nearby and use the affected waterways for recreation, that they avoid eating fish or drinking the water that originates from the waterways due to their pollution, that they rely on PIRG and FOE to protect their interest in the waterways, and that they use the waterways and the surrounding land to hike, fish, boat, study nature and swim. One affiant states that he has high blood pressure which requires him to limit his sodium restriction (an admitted effluent). *See* Exhibit 2 ¶4-6. This affiant also states that he cannot swim in the polluted waters due to his psoriasis, although he could swim in the waters if they were clean. *Id.*

Plaintiffs provide reports which state that excess Total Organic Carbon ("TOC") depletes the amount of dissolved oxygen in the water, which in turn affects the survival of fish and other aquatic life. *See* Plaintiffs' Exhibits 8, 9 and 11 to their Summary Judgment motion. Plaintiffs also provide a report by the New Jersey Department of Environmental Protection which states that the Wickecheoke Creek has been deemed to have "moderately degraded fisheries" due to wastewater discharges. *See* Plaintiffs' Exhibit 12 attached to their Reply Brief on standing.

MEI characterizes the affiants' injuries as "general and generic environmental concerns" which are insufficient to establish a direct injury. The court disagrees. In *Powell* the organizations presented affidavits of their members which stated that they resided in the vicinity or owned property or recreated on

or near the waterway in question. The members stated that they were bothered by the smell and oily sheen of the water and stated that they would boat, fish, or swim in the water if it was cleaner. The Third Circuit held that the members stated sufficient injury to satisfy the Supreme Court's requirement in *Sierra Club v. Morton*, 405 U.S. 727 [3 ERC 2039] (1972) (holding that harm to aesthetic and recreational interests is sufficient to confer standing). *Powell*, 913 F.2d at 71. The *Powell* court noted that the interests at stake need not be large to be cognizable. *Id.*

[1] As in *Powell*, plaintiffs' members have submitted affidavits in which they state that but for the pollution, they [2081] would swim, drink and fish in the affected waterways. Chaim and Elaine Gold, among others, stated that their health has been affected by the excess discharge of sodium and oil. Julie Howat stated that she does not drink the water provided to her from the waterways, nor does she eat fish known to come from these waters, although she would if the water were known to be cleaner. These interests are sufficient under *Powell* and *Morton* to show actual or threatened injury to PIRG's and FOE's members.

Nor does the fact that the members live downstream from MEI's discharge point affect their standing. As Judge Thompson noted in *Public Interest Research Group v. Yates Industries*, 757 F. Supp. 438, 443 [33 ERC 1142] (D.N.J. 1991), "it is enough to show that plaintiffs' members have suffered injuries through waters directly affected by any illegal discharges." To hold otherwise would enable a polluter to "avoid suit by controlling all access to some discrete body of water which flows into another waterway, ensuring that no

potential plaintiff gained access to the actual discharge point, thus giving the polluter free reign to damage downstream points." *Id.*

Plaintiffs also argue that they and their members have suffered injuries as a result of MEI's failure to monitor and report as required by its permit. Plaintiffs assert that the purpose of the monitoring and reporting requirements is, in part, to assist the public in enforcement of the statute. Therefore, MEI's failure to monitor and report as required by its permit prohibited plaintiffs from bringing suit. *See* Plaintiffs' Exhibits 5 and 6. Plaintiffs also argue that due to MEI's failure to monitor and report its discharge levels, plaintiffs were unable to obtain accurate information to conduct research, prepare reports and make proposals and recommendations to the State Legislature, etc. *Id.*

Violations of the Act include failure to monitor or report as required by the permit and courts have permitted citizen suits to enforce the monitoring and reporting aspect of the Act. *See Yates*, 757 F. Supp. at 442 and 448; *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120, 1132 [23 ERC 1018] (D.Md. 1985), *aff'd*, 847 F.2d 1109 [27 ERC 1881] (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3185 [30 ERC 1064] (1989); *Menzel v. County Utilities Corp.*, 712 F.2d 91, 94 [19 ERC 2193] (4th Cir. 1983). Therefore, the court concludes that plaintiffs have demonstrated that they are injured by MEI's failure to monitor and report as required by the Act.

2. Fairly Traceable

MEI argues that plaintiffs' injuries are not directly traceable to its violations, claiming *inter alia* that its effluents did not cause the pollution.

The Third Circuit has held that the causation requirement of the second prong of *Valley Forge* does not require plaintiffs to show "to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs". *Powell*, 913 F.2d at 72. Instead, plaintiffs "need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiff's harm". *Id. quoting Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 [11 ERC 1753] (1978). Under the Clean Water Act, this likelihood may be establish by demonstrating that:

> 1) the defendant has discharged some pollutant in concentrations greater than allowed by its permit;
>
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and
>
> 3) that this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell, 913 F.2d at 72.

Plaintiffs assert that they have established discharge of pollutants in concentrations greater than allowed by MEI's permit through MEI's stipulations of liability and its DMRs, which establish discharges in excess of its permit limitations. MEI argues that the violations were "technical" and insufficient to cause plaintiffs' injuries. This identical argument was rejected by Judge Thompson in *Yates*, 757 F. Supp. at 443 (noting that this argument is contrary to the intent of the Act) and Judge Ackerman in the District Court decision in *Powell*, 627 F. Supp. 1074, 1083 (D.N.J. 1986). *See also SPIRG v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1397 [22 ERC 1327] (D.N.J. 1985) ("The effect of the defendant's

argument would be to prohibit any citizens' suits against violators of the FWPCA unless the violation was so great or the waterway so small that the direct impact of the discharges could be pinpointed. This interpretation of the [2082] FWPCA would be directly contrary to its intent.")

Pliantiffs' members have submitted affidavits which establish their interest in the waterways into which MEI discharges its effluents and the effects on their interests. As noted *supra*, plaintiffs provide evidence that the effluents, *inter alia*, threaten (and in fact have already diminished) the aquatic life in the waterways. *See also Yates*, 757 F. Supp. at 443 (excess copper, lead, cadmium and zinc can harm aquatic life). Therefore, plaintiffs meet the second requirements of *Powell*.

Finally, plaintiffs provide evidence that the effluents discharged by MEI cause or contribute to the kinds of injuries alleged by plaintiffs. For example, the excess sodium causes Chaim Gold to avoid drinking the water due to his high blood pressure. The oil discharge prevents Mr. Gold from swimming in the water. The excess TOC causes several of plaintiffs' members to avoid drinking the water and eating fish caught in the waterways.

Plaintiffs also state that MEI's failure to monitor or report its discharge as required by its permit resulted in plaintiffs' inability to have correct figures with which to do research or bring suit to enforce the Act. Citizens depend upon the monitoring and reporting by the permit holder to bring suits to enforce the Act, and without his information plaintiffs' cannot enforce the Act as "private attorneys general". *See Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 17 [16 ERC 1118] (1980). Plaintiffs assert that their subsequent

independent review of MEI's figures established 30 additional violations which plaintiffs were unable to allege in the complaint due to MEI's failure to report them. This injury, if proved, would be traceable to MEI's failure to monitor and report as required by its permit.

3. Redressibility

The last *Valley Forge* test for individual standing is that the plaintiff's injuries are "likely to be redressed by a favorable decision." *Powell*, 913 F.2d at 73, *quoting Valley Forge*, 454 U.S. at 472. The inquiry focuses on the relationship between the plaintiff's injury and the judicial relief sought. *Powell*, 913 F.2d at 73. The court noted that where a plaintiff alleges harm to the water quality because a defendant violated its permit limitations, an injunction would redress the injury by forcing the defendant to comply with its permit. *Id.* The plaintiff "need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." *Id.*

The *Powell* court went on to note the connection between civil penalties and the injuries to the plaintiffs. "Where Congress has expressly granted a right of action and plaintiffs have shown 'a distinct and palpable injury', plaintiffs 'may invoke the general public interest in support of their claim' ". *Id.*, *quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975). The court also noted that penalties will deter the defendant and other permit holders. *Id. See also Yates*, 757 F. Supp. at 444.

As in *Powell*, the rights of PIRG and FOE members will be redressed by a favorable decision, which would force MEI to comply with its permit. Therefore, the individual members of PIRG and FOE would have a claim that can be redressed by this court.

B. Interests Of The Organization

To determine whether PIRG and FOE have standing to litigate this case, the court must next determine whether the interests that the organizations seek to protect are germane to their purpose. Plaintiffs provide the affidavits of Jeanette Jenkins and Brent Blackwelder (Plaintiff's Exhibits 5 and 6) which state that their organizations conduct research, make recommendations to the legislature, submit comments to the New Jersey DEP concerning the issuance of permits under the Act, and initiate citizen-enforcement suits under the Act. PIRG's and FOE's actions to protect their members' health and recreational, aesthetic and environmental interests in the surrounding waterways and to enforce the Act to obtain cleaner waterways are germane to their purpose as organizations.

C. Individual Participation

The final aspect of the standing test under *Hunt* requires a determination of whether the claims asserted or the relief requested require individual participation by the organizations' members. In this case, as in the redressibility question, plaintiffs seek compliance with the Act, as well as the imposition of civil damages. This relief does not require the individual participation of the members [2083] of FOE or PIRG, since their interests will be served and redressed by a successful outcome of the suit.

Therefore, having met the 3 parts of the *Hunt* test, PIRG and FOE have standing to litigate on behalf of their members.

II. Partial Summary Judgment On Liability

As noted *supra*, MEI has stipulated to liability for all permit violations except TOC.

A. TOC

[2] Plaintiffs assert that they are entitled to summary judgment on liability since they have provided evidence through MEI's own DMRs to establish that MEI exceeded its permit limitations for discharge of TOC. Government-mandated records are treated as party admissions to establish civil liability under the Act. *United States v. Ward*, 448 U.S. 242 [14 ERC 1673] (1980). Thus numerous courts have granted summary judgment on liability based upon violations reported in a defendant's DMR's. *SPIRG v. PD Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1090 [23 ERC 1894] (D.N.J. 1986), *aff'd*, 913 F.2d 64 [31 ERC 1905] (3d Cir. 1990); *Yates*, 757 F. Supp. at 447-8; *SPIRG v. Tenneco Polymers*, 602 F. Supp. 1394, 1400 (D.N.J. 1985); *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120 (D.Md. 1985); *SPIRG v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528, 1538 [20 ERC 1624] (D.N.J. 1984), *aff'd*, 759 F.2d 1131 [22 ERC 1721] (3d Cir. 1985); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 452 [22 ERC 1894] (D.Md. 1985); *SPIRG v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1429-30 [23 ERC 1338] (D.N.J. 1985); *PIRG v. GAF Corp.*, D.N.J., Civil Action No. 89-2283, November 20, 1990, slip op. pp. 25-28.

As noted *supra*, a violation of the discharge permit limitations violates the Act. 33 U.S.C. §1311. Courts have held defendants strictly liable for such violations. *PD Oil*, 627 F. Supp. at 1087; *SPIRG v. Georgia-Pacific*, 615 F. Supp. at 1429-30; *Simkins Industries*, 617 F. Supp. at 1128; *Chesapeake Bay*, 68 F. Supp. at 451.

While MEI concedes that DMRs may be deemed admissions for purposes of liability, it asserts that they are not conclusive proof when challenged, citing *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532 [22 ERC 1143] (W.D.N.Y. 1984). MEI states that its DMRs do not accurately reflect the TOC levels of its discharge because the laboratories performing the tests failed to purge inorganic carbon from the samples, resulting in artificially inflated TOC levels. MEI bases this argument on the affidavit of its former Senior Vice President Glen McIntyre. *See* Defense Exhibit B. McIntyre states that the testing protocol employed by the laboratories erroneously reported both organic and inorganic carbon. *Id.* at ¶¶6 and 7.

Some cases in this Circuit have held that summary judgment cannot be avoided as to liability simply by challenging the accuracy of the data in the DMRs. *PD Oil*, 627 F. Supp. at 1089 (citations omitted). Other courts have held that laboratory error may be used to challenge DMRs to oppose summary judgment, but *only* where the defendant presents direct evidence of errors in the actual tests performed which showed a permit violation. *Yates*, 757 F. Supp. at 447; *Fritzsche*, 579 F. Supp. at 1538; *Tenneco*, 602 F. Supp. at 1400; *SPIRG v. AT & T Bell Lab.*, 617 F. Supp. 1190, 1205 [23 ERC 1201] (D.N.J. 1985). "[I]n light of the strong evidentiary emphasis placed on DMRs, defendant has a heavy burden to establish faulty analysis." *Yates*, 757 F. Supp. at 447. The burden is not met by "speculation" of measurement error. *Id.* Thus, in *Yates* the court found that the defendant's letters outlining its theories of other causes for the discharges were insufficient to create an issue of fact to preclude summary judgment, since the letters did not prove errors which occurred in the actual tests performed. *Id.*

Therefore, the only basis upon which MEI may oppose summary judgment on liability for TOC violations as a matter of law in this circuit is to demonstrate error in the actual tests performed. It has attempted to do this by the aforementioned affidavit of Dr. McIntyre, which states that in his opinion the analytical testing method used by Technion Labs and OBG Labs, Inc., which analyzed its samples from '84-'89, did not accurately reflect TOC in its samples since it erroneously measured total carbon, rather than just organic carbon. *See* Defense Exhibit B at ¶¶5-6.

Plaintiffs provide the deposition of Omar Baturay ("Baturay") the Vice President of Technion (which tested 11 [2084] samples from MEI). *See* Plaintiffs' Exhibit 12. Baturay states that Technion employed a procedure which purged inorganic carbon from MEI's samples. *Id.* at 17-18. Plaintiffs also provide an affidavit by Vincent Pugliese, the Vice President and CEO of Acutest (which tested 2 of MEI's samples). Pugliese states that Acutest likewise employed a test protocol which purged inorganic carbon from samples tested during the period in which Acutest tested MEI's samples. *See* Plaintiffs' Exhibit 13 at pp. 1-2. Both labs employ the "compensation method" approved by the EPA.

MEI's samples were also tested by a third laboratory, OBG, which tested 14 MEI samples at issue in this case. In a letter to McIntyre, David Hill, OBG's Vice President, stated that OBG did not purge inorganic carbon from wastewater samples prior to testing. *See* Defense Exhibit B. However, Hill states in his deposition that OBG employs an EPA-approved method to compensate for inorganic carbon which subtracts the inorganic carbon results from the total carbon results to achieve an organic carbon level. *See* Plaintiffs' Exhibit

14 at 15-18. The EPA considers this method (EPA method 415.1) valid to measure TOC. *See* 40 C.F.R. Part 136 (cited in MEI's permit at p. 3, Part I, section (j)(3)-Plaintiffs' Exhibit 2).

Contrary to MEI's assertions, all the laboratories measuring the samples at issue followed EPA-approved methods to compensate for inorganic carbon and render valid measurements of TOC levels. MEI violated the TOC limitations contained in its permit in samples measured by either method. At oral argument on this issue, MEI's counsel stated that MEI's opposition to summary judgment rests on its belief that the EPA-approved method employed by OBG and Technion overstated TOC levels and was inappropriate for MEI's wastewater sample. Therefore, MEI does not challenge the accuracy of the actual measurements performed, as required by *Yates* and *Fritzsche*. MEI has failed to meet its burden of establishing that the actual tests performed were inaccurate. *See Yates*, 757 F. Supp. at 447. Therefore, summary judgment is appropriate.

MEI opposes summary judgment by asserting that one EPA approved method for measuring TOC levels overstates TOC in its samples. Thus, MEI asks the Court to make a determination that one of the EPA-approved methods for measuring TOC is inaccurate. This is a decision ill-suited for courts.

Moreover, in *Powell* the Third Circuit noted that challenges to the validity of the terms of a defendant's discharge permit are not permitted by §509(b)(2) of the Act, 33 U.S.C. §1369(b)(2). 913 F.2d at 77-78. In *Powell* the defendant had argued that it could not be held liable for its excess discharges since they related only to continuous dischargers, while the defendant was only an

intermittent discharger. The court rejected this claim, noting that §1369 prohibited the court from entertaining the issue, notwithstanding its merits. *Id.*[2] The defendant had had an opportunity to challenge the conditions of its permit through the administrative process and the state court system within 30 days after issuance of the permit, but failed to do so. Hence, the defendant was barred from raising the claim in an enforcement action, since it had "forever" lost the right to do so. *Id.* at 78. Similarly, in *Yates*, Judge Thompson found that the defendant's argument that DEP officials had orally promised that its permit would not be enforced by its terms was, in effect, a challenge to the terms of the defendant's permit, which was prohibited by §1369. 757 F. Supp. at 445-46.

MEI's permit states that test procedures for pollutants, including TOC, shall conform to the methods set forth in regulations promulgated pursuant to §304(g) of the Act. *See* Plaintiffs' Exhibit 1, p. 8 to Brief in Support of Summary Judgment. The regulation enacted pursuant to §304(g) sets forth the two aforementioned EPA-approved methods for measuring TOC. By challenging the EPA-approved method of measuring TOC contained in its permit, MEI is directly challenging its permit. If MEI wished to challenge EPA's standard procedures for measuring TOC as inappropriate for its wastewater, it should have done so within 30 days of the issuance of it permit rather than in the present enforcement action. *See Powell*, 913 F.2d at 78; *Yates*, 757 F. Supp. at 445; *PD Oil*, 627 F. Supp. at 1088.

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[2] §1369(b)(2) provides that challenges to permits issued under the Act "shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

As an alternative basis for opposing summary judgment, MEI states that [2085] there are issues of fact as to whether it caused the high TOC levels. As noted *supra*, a violation of the permit is a violation of the Act. 33 U.S.C. §1311. Any discharge not pursuant to a permit it automatically a violation of the Act. As Judge Ackerman noted in *PD Oil*, Congress has determined what effluent levels are violative of the Act and it is not the court's role to reexamine this issue. 627 F. Supp. at 1083. *Accord NRDC v. Texaco*, 719 F. Supp. 281, 288-89 [30 ERC 1145] (D. Del. 1989), *vacated in part on other grounds*, 906 F.2d 934 [31 ERC 1605] (3d Cir. 1990). As noted in *Tenneco Polymers*, the legislative history of the Act establishes Congress' intent that no lengthy fact-finding occur during enforcement procedures.

> [T]he bill . . . establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these requirements is to avoid the necessity of lengthy fact finding investigations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

Tenneco Polymers, 602 F.Supp. at 1400, *quoting* S. Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730. Thus, once it has been established that the defendant has discharged a pollutant in excess of its permit levels, unless the defendant can establish that the testing was inaccurate, summary judgment is appropriate. *See Yates; PD Oil; Tenneco; Chesapeake Bay.*

For the aforementioned reasons, summary judgment is appropriate on liability as to the 27 discharges of TOC.

B. Reporting and Monitoring

Plaintiffs assert that MEI failed on five occasions to report violations of the discharge limitations in its permit on its DMRs, which was subsequently discovered by plaintiffs upon examination of MEI's records. Plaintiffs assert that this failure resulted in their inability to assert an additional 30 discharge violations in the complaint.

Plaintiffs assert that MEI failed on 76 occasions to monitor pursuant to its permit, within the time period required by the permit. As a result, they allege that it is impossible to know the level of MEI's discharges at those times, which inhibits plaintiffs' enforcement activities under the Act.

MEI's permit requires it to monitor its discharge once a month and report any violations in its DMRs. *See* Plaintiffs Exhibit 2, p.2, Part I. MEI must certify that the submitted information is "true, accurate, and complete." *Id.* at 3, Part I, section (k)(4). MEI does not oppose plaintiffs' summary judgment motion as it relates to its monitoring and reporting violations. Therefore, summary judgment is appropriate as to these violations.

III. Permanent Injunction

Plaintiffs request a permanent injunction restraining MEI from continuing to violate its permit. Plaintiffs cite cases in which injunctive relief was granted upon a finding that the defendants exceeded the discharge limits in their permits.[3] The Third Circuit, in affirming the permanent injunction entered in *Powell*, narrowed the

[3] For example, *SPIRG v. Monsanto*, 29 ERC 1078 (D.N.J. 1988); *Powell* 1, 720 F.Supp. 1158 (D.N.J. 1989); *PIRG v. Witco Chemical Corp.*, 31 ERC 1571 (D.N.J. 1990); *Yates*, 757 F.Supp. 438, 454-55 (D.N.J. 1991).

scope of the injunction to eliminate injunctive relief against violations of future permits. *Powell*, 913 F.2d at 83. Accordingly, the court will not restrain MEI from violating any new permit. As to the existing permit

> A court may only enter a permanent injunction 'after a showing of both irreparable injury and inadequacy of legal remedies, and a balancing of competing claims of injury and the public interest'.

Powell, 913 F.2d at 82, *quoting Natural Resources Defense Council v. Texaco Refining and Marketing, Inc.*, 906 F.2d 934, 941 (3d Cir. 1990).

A. Success On The Merits

[3] Since the court will grant summary judgment on the 27 TOC violations and the monitoring and reporting violations, plaintiffs have achieved success on the merits.

B. Irreparable Injury

1. Likelihood Of Irreparable Injury

In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987), the Supreme Court stated:

> [2086] Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

In *Texaco Refining* the Court of Appeals for the Third Circuit remanded the case to the district court since it had failed to apply traditional equitable principles to its injunctive relief analysis. However, the Court of Appeals advised the district court that it should bear in mind the aforementioned language in *Amoco*. *Texaco*, 906 F.2d at 94.

Plaintiffs assert that Congress has determined that discharges of pollutants into the nation's waterways in excess of the levels set by the EPA *a fortiori* cause harm. As noted in *Yates*, the purpose of the Act is to reduce the total amount of effluent discharges, and injury occurs when permit limitations on discharges are exceeded. *Yates*, 757 F.Supp. at 454 (citations omitted).

Plaintiffs assert that there is an immediate threat of irreparable injury to aquatic life in the affected waterways, as well as to the health, recreational and aesthetic interests of its members. In support, plaintiffs provide an EPA report which states that the Creek has been affected by the discharges, and EPA reports which detail the harm which results from the various pollutants discharged by MEI. *See* Plaintiffs' Exhibits 12 (in Reply Brief on Standing), 8 and 11 (of initial moving brief).

In the 1990 State Water Quality Inventory Report, the Wickecheoke Creek is described as "moderately degraded" due to wastewater discharges. *See* Plaintiffs' Exhibit 12 at 109, 110 (in Reply Brief on Standing).

MEI has violated its permit discharge levels for total dissolved solids; sodium, temperature, oil and TOC.

An EPA report notes the toxicity of oils to aquatic organisms at levels as low as 1 mg/liter, and the long-term effect of oil pollutants incorporated into sediments in the waterways. *See* Plaintiffs' Exhibit 12 at 210, 211, 219 to Summary Judgment Brief. This report also notes that the fish population is adversely affected at dissolved oxygen concentrations of 4 mg/liter or less. *Id.* at 226. Decreased oxygen levels also affect "aquatic insects and other animals upon which fish feed." *Id.* at 227.

Excess total dissolved solids, particularly sodium sulfate and magnesium sulfate, adversely affect persons suffering from cardiac disease and pregnancy-related toxemia. *Id.* at 394 and 395. Excess dissolved solids also have a deleterious effect on fish and other aquatic life. *Id.* at 397-398. *See* also Plaintiffs' Exhibit 11 to Brief in Support of Summary Judgment, at 1-2; 4-5.

"Increased temperatures accelerate the biodegradation of organic materials . . . which makes increased demands on the dissolved oxygen resources of a given system." Plaintiffs' Exhibit 12 at 423. Fish and other aquatic life are adversely affected by increased temperatures. *Id.* at 425-436.

The aforementioned reports establish harm to aquatic life and the public health when the aforementioned substances are discharged at levels in excess of MEI's permit limitations.

Plaintiffs also assert irreparable injury from MEI's failure to monitor and report pursuant to its permit requirements, in that plaintiffs are unable to research, report their findings to their members or legislative bodies and generally enforce the Act as intended by Congress.

In response, MEI asserts that plaintiffs have failed to demonstrate the likelihood of irreparable harm. In support, MEI provides the affidavit of Kathleen Keating, a Professor of Environmental Sciences. Keating's affidavit states only that in her opinion the "excursions at issue would not result in irreversible changes to the creek environment". *See* Defense Exhibit A at ¶5. The court is wary of Keating's conclusory affidavit, which equates irreparable injury with "irreversible" injury. In *Amoco* the Supreme Court

described irreparable environmental injury as "of long duration". 480 U.S. at 545. Where such injury is sufficiently likely, injunctive relief is generally warranted to protect the environment. *Id.*

MEI further argues that plaintiffs have not shown actual injury to the environment. However, this argument is directly contradicted by the EPA report which found changes in the Creek which affected fish and other aquatic life. *See* discussion *supra.*

[2087] For the aforementioned reasons, there is a likelihood of irreparable injury if MEI is likely to resume discharging its effluent into the waterways.

2. Likelihood Of Resumption Of Discharge

Plaintiffs note that since 1989, shortly after they filed suit, MEI began voluntarily hauling its effluent to the Trenton Sewer Authority. Noting the expense of this procedure, plaintiffs assert that unless an injunction is issued, MEI will return to its former practice of discharging the effluent into the Creek. This is especially true, plaintiffs assert, in light of MEI's statement that it "will resume discharge". *See* Defense Exhibit B.

Economic hardship has been rejected as a basis for denying injunctive relief. *See SPIRG v. Fritzsche, Dodge & Olcott Inc.*, 579 F.Supp. 1528, 1537 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985); *Yates*, 757 F.Supp. at 456. Likewise, the economic cost of compliance is a relevant factor in determining whether resumption of discharge is likely. As noted, MEI has stated its intent to resume discharging into the waterways.

In addition, MEI has failed to report and monitor its discharge levels, as required by the Act. This renders the Act unenforceable as the NJDEP is unable to determine

if MEI is discharging effluents within its permit requirements. *See Sierra Club v. Simkins Industries*, 847 F.2d 1109, 1115 (4th Cir. 1988). MEI has not provided the court with any evidence that establishes that a resumption of discharge will not result in discharge levels in excess of its permit limitations.

Moreover, MEI's history, which includes excess discharges before 1984, prosecution of which is barred by the Statute of Limitations, also supports a conclusion that MEI is likely to resume discharge.

In light of the expense of hauling its effluent, MEI's failure to monitor and report its discharges, and MEI's history, the court concludes that MEI is likely to resume discharging its effluents unless a permanent injunction is issued.

C. Balance Of Harm

Plaintiffs assert that the balance of harm requires the issuance of injunctive relief, since harm to the public health and aquatic life has been demonstrated. *See* Plaintiffs' Exhibits 11 and 12. As noted *supra*, economic hardship in complying with the act does not outweigh the benefit to the community in ensuring compliance with the act. *Fritzsche*, 579 F.Supp. at 1537; *United States v. Ciampitti*, 583 F.Supp. 483, 499 [20 ERC 1926] (D.N.J. 1984). The balance of harm clearly favors the issuance of injunctive relief.

D. Public Interest

The purpose of the Act is to protect the public interest in the integrity of the nation's waters. 33 U.S.C. §1251(a). Therefore, in this case injunctive relief

enjoining MEI from discharging harmful effluents into the waterways is in the public interest. *See Ciampitti*, 583 F.Supp. at 499.

For the aforementioned reasons, the court concludes that a permanent injunction is appropriate to enforce the Act. Plaintiffs' counsel shall submit an appropriate order, consented to as to form.

ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

(Filed February 28, 1992)

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

ORDER

Upon consideration of plaintiffs' motions for partial summary judgment as to defendant's liability for violations of its discharge limitation for total organic carbon, for permanent injunctive relief, and for a declaratory judgment that plaintiffs have standing to maintain this action; the arguments of counsel; and the briefs and exhibits submitted by the parties in support or opposition thereto, it is this 28th day of February, 1992,

ORDERED, that plaintiffs' motion for a declaratory judgment that plaintiffs have standing on behalf of themselves and their members to maintain this citizen enforcement action under the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, is granted, and it is further

ORDERED, that plaintiffs' motion for partial summary judgment on the issue of defendant's liability for its TOC discharge violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, and the NPDES/NJPDES permit issued to defendant thereunder, as set forth in Appendix A, attached hereto is granted, and it is further

ORDERED, that plaintiffs' motion for permanent injunctive relief is granted and defendant is hereby enjoined from discharging wastewater from its facility located in Kingwood Township, Hunterdon County, New Jersey, until such time as NPDES/NJPDES Permit No. NJ 0027537, which became effective on December 1, 1984, is superceded by a new permit, and it is further

ORDERED, that defendant shall submit to plaintiffs its discharge monitoring reports (DMRs) and all other documents containing monitoring results, including laboratory reports, within three days of its submission of its discharge monitoring reports (DMRs) to the government regulatory agencies, and it is further

ORDERED, that this case shall proceed to trial on the issue of other appropriate remedies for defendant's violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*

/s/ JOHN C. LIFLAND
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING

(Dated January 8, 1993)

No. 92-5161

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.; FRIENDS OF THE EARTH; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Plaintiff,

v.

MAGNESIUM ELEKTRON, INC.,
Appellant.

(D.C. Civ. No. 89-03193)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and HIGGINBOTHAM*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all

* As to panel rehearing only.

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ A. J. SCIRICA
Circuit Judge

Dated: January 8, 1993

33 U.S.C.S. §1365

§1365. Citizen suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS §1319(d)].

* * *

PLAINTIFFS' EXHIBIT 1

AFFIDAVIT OF SANDRA SILVERSTONE

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF SANDRA SILVERSTON

I, Sandra Silverstone, do hereby affirm and state:

1. I have been a member of both Friends of the Earth and Public Interest Research Group of New Jersey, Inc., (hereafter "NJPIRG") for approximately two years.

2. I reside at 203 Riverview Road, Bridgewater, New Jersey 08807, where I have lived for seven years.

3. I enjoy walking, hiking, and studying nature with my husband and two children along the Delaware and Raritan Canal and the Delaware River in New Jersey between Frenchtown and Lambertville and desire to continue this activity. I also enjoy sightseeing along the

River and the Canal between Frenchtown and Lambertville and visiting the towns and historic sites in this area. My enjoyment of these activities is significantly affected to the extent I know that the waterway along which I am walking, hiking, studying nature, or sightseeing contains pollution.

4. I avoid eating fish caught in the Delaware and Raritan Canal or the Delaware River because I am concerned that those fish might be contaminated with harmful pollutants. I do not believe that it is safe to eat fish caught in these waters at the present time but would eat fish caught in them if the waters were cleaner.

5. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters between Frenchtown and Lambertville and downstream waters. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

6. One of the reasons I belong to Friends of the Earth and NJPIRG is because I support their activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

7. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that

government agencies, Friends of the Earth, NJPIRG, and other citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I hike, study nature, and recreate along the Delaware and Raritan Canal and the Delaware River between Frenchtown and Lambertville and would eat fish caught there if the waters were cleaner, I benefit significantly from these efforts to protect the River and Canal from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of April, 1991.

/s/ SANDRA SILVERSTONE
Sandra Silverstone

PLAINTIFFS' EXHIBIT 2

AFFIDAVIT OF CHAIM GOLD

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF CHAIM GOLD

I, Chaim Gold, do hereby affirm and state:

1. I have been a member of Friends of the Earth for approximately 13 years.

2. I live at 28 Richey Place, Trenton, New Jersey 08618, where I have owned a home with my wife for 15 years. My home is located on the strip of land between the Delaware River and the Delaware and Raritan Canal. I live approximately 200 yards east of the river, 200 yards west of the Canal, and 17 miles downstream of Prallsville, where Wickecheoke Creek enters the Delaware and Raritan Canal and the Delaware River.

3. Every summer for the past 15 years, I have enjoyed boating, fishing, water skiing, and swimming with my wife and friends along the Delaware River between Trenton and Philadelphia. My wife and I own a boat and desire to continue these activities. I also enjoy hiking along the Delaware and Raritan Canal and the Delaware River in Washington Crossing State Park, which is located in New Jersey approximately 7 miles downstream of Prallsville. My enjoyment of these activities is significantly affected to the extent I know that the waterway in which I am boating, fishing, water skiing, or swimming or along which I am hiking contains pollution.

4. I have high blood pressure and, on my doctor's advice, restrict myself to a salt-free diet. The drinking water supply for Trenton and surrounding communities is taken from the Delaware River. Looking out a window of my home, I can see the water intakes for the Trenton water filtration plant, which are located approximately 300 yards downstream from my home. High levels of sodium in my drinking water could seriously effect my health.

5. I know that many other communities in central New Jersey draw their drinking water from the Delaware and Raritan Canal at Lambertville, which is located approximately 4 miles below Prallsville. I also know that the water intakes for the community of Morrisville, Pennsylvania, are located approximately 100 yards downstream of the Trenton water intakes, and the water intakes for Philadelphia are located approximately another 23 miles downstream of the Morrisville intakes. My knowledge of the locations of the various municipal water intakes was gained as a result of my 15-year residence in Trenton, my work as a real estate agent, and

discussions over the years with friends who are active in environmental activities. In addition, I am presently chairman of the Solid Waste Advisory Council in Mercer County and a member of the Mayor's Economic Development Committee in Trenton.

6. I have a skin condition called psoriasis. It is very important to me to be able to continue my boating activities on the Delaware River because sunbathing improves the condition of my skin. I have found that swimming in polluted waters has a detrimental effect on my psoriasis condition, but swimming in very clean waters actually improves the condition of my skin.

7. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters downstream of Prallsville. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

8. One of the reasons I belong to Friends of the Earth is because I support its activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

9. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that government agencies, Friends of the Earth, and other

citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I go boating, water skiing, fishing, and swimming along the Delaware River and hiking along the Delaware and Raritan Canal and the Delaware River downstream of Prallsville, I benefit significantly from these efforts to protect the River and Canal from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10 day of May, 1991.

/s/ CHAIM GOLD
Chaim Gold

PLAINTIFFS' EXHIBIT 3

AFFIDAVIT OF ELAINE GOLD

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF ELAINE GOLD

I, Elaine Gold, do hereby affirm and state:

1. I have been a member of Friends of the Earth for approximately 13 years.

2. I live at 28 Richey Place, Trenton, New Jersey 08618, where I have owned a home with my husband for 15 years. My home is located on the strip of land between the Delaware River and the Delaware and Raritan Canal. I live approximately 200 yards east of the River, 200 yards west of the Canal, and 17 miles downstream of Prallsville, where Wickecheoke Creek enters the Delaware and Raritan Canal and the Delaware River.

3. Every summer for the past 15 years, I have enjoyed boating, water skiing, fishing, and swimming with my husband and friends along the Delaware River between Trenton and Philadelphia. My husband and I own a boat and desire to continue these activities. I also enjoy hiking along the Delaware and Raritan Canal and the Delaware River in Washington Crossing State Park, which is located in New Jersey approximately 7 miles downstream of Prallsville. My enjoyment of these activities is significantly affected to the extent I know that the waterway in which I am boating, fishing, water skiing, or swimming or along which I am hiking contains pollution.

4. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters downstream of Prallsville. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

5. One of the reasons I belong to Friends of the Earth is because I support its activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

6. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that

government agencies, Friends of the Earth, and other citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I go swimming, boating, water skiing, and fishing along the Delaware River and hiking along the Delaware and Raritan Canal and Delaware River downstream of Prallsville, I benefit significantly from these efforts to protect the River and Canal from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10 day of May, 1991.

/s/ ELAINE WALSH GOLD
Elaine Gold

PLAINTIFFS' EXHIBIT 4

AFFIDAVIT OF JULIE HOWAT

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF JULIE HOWAT

I, Julie Howat, do hereby affirm and state:

1. I have been a member of Friends of the Earth for approximately one and a half years.

2. I am 22 years old and have lived in New Jersey all of my life. I now live at 12 Heritage Court, West Trenton, New Jersey 08628, where I have lived for the past 3 years. My home is located approximately 1 mile from the Delaware River and the Delaware and Raritan Canal, and approximately 12 miles downstream of Prallsville, where Wickecheoke Creek enters the Delaware and Raritan Canal and the Delaware River.

3. I enjoy walking, picnicking, and studying nature along the Delaware and Raritan Canal and the Delaware River in the area adjacent to Washington Crossing State Park, which is located approximately 7 miles downstream of Prallsville. My enjoyment of these activities is significantly affected to the extent I know that the waterway along which I am walking, picnicking, or studying nature contains pollution.

4. I avoid drinking water taken directly from the Delaware and Raritan Canal or the Delaware River because I am concerned that the water might be contaminated. I avoid eating fish caught in the Delaware and Raritan Canal or the Delaware River because I am concerned that those fish might be contaminated with harmful pollutants. I do not believe that it is safe to drink water directly from these waters or to eat fish caught there at the present time but would drink water or eat fish caught from them if the waters were cleaner.

5. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters downstream of Prallsville. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

6. One of the reasons I belong to Friends of the Earth is because I support its activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

7. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that government agencies, Friends of the Earth and other citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I go walking and picnicking along the Delaware and Raritan Canal and the Delaware River downstream of Prallsville and would eat fish caught there if the waters were cleaner, I benefit significantly from these efforts to protect the Canal and River from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of April, 1991.

/s/ JULIE HOWAT 5/1/91
Julie Howat